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No. 82-1167

IN THE

Supreme Court of the United States

October Term 1982

UNITED STATES OF AMERICA,
Petitioner,

vs.

BRADLEY THOMAS JACOBSEN and
DONNA MARIE JACOBSEN,
Respondents.

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

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QUESTION PRESENTED

DID THE COURT OF APPEALS ERR IN CONCLUDING THAT NARCOTICS AGENTS VIOLATED THE FOURTH AMENDMENT BY CONDUCTING A MORE EXTENSIVE WARRANTLESS SEARCH OF A PACKAGE THAN THAT PREVIOUSLY CONDUCTED BY PRIVATE PERSONS.

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STATEMENT OF THE CASE*

The Government seeks review of the decision of the United States Court of Appeals for the Eighth Circuit holding that federal agents violated the Fourth Amendment where, after a search of a package by private persons, they extended that search by removing several samples of a substance which field testing revealed to be cocaine.

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*"T." refers to the transcript of trial.
"S.H." refers to the transcript of the suppression hearing, May 26, 1981.
"Pet." refers to the Government's Petition for a Writ of Certiorari.
"App." refers to the Appendices to the Government's Petition.

1. On the morning of May 1, 1981, a "sorter" for the Federal Express office in Minneapolis, Minnesota, brought to the attention of his supervisor a damaged package. (T. 563). Pursuant to company policy the package was opened to determine possible damage to the contents. (T. 537; S.H. 53).

The package itself was approximately 6x6x10 inches in dimension. (T. 19). Brown wrapping paper and a Federal Express shipping label appeared on the outside; inside that was a cardboard box; and upon opening the package, rolled-up newspapers were found to surround a tube of gray duct tape, approximately ten inches long and two inches wide, which in turn contained four plastic baggies, the innermost of which contained a white, powdery substance. (S.H. 55; T. 20).

Federal Express employees suspected that the substance was an illegal drug; therefore they contacted the regional security manager for Federal Express, who told them to contact the local Drug Enforcement Administration office. (S.H. 55; T. 538). The plastic baggies containing the substance were replaced within the tube of duct tape, which was replaced in the box, covered by the newspapers, and the package was then locked in a file cabinet. (S.H. 56).

DEA Agent James Lewis received the first contact from Federal Express, and Agent Jerry Kramer was the first to arrive at the Federal Express office at the airport. (S.H. 16, 29). The package was turned over to Kramer, who then closely examined it and its contents, including removing a sample of the substance, which field-tested positive for cocaine. (S.H. 29, 59).

Shortly thereafter, Agent Lewis arrived at the Federal

Express office. He proceeded to examine the open package at this time, noting that it was addressed to "B. Jacobs", at Respondents' address. (T. 20; S.H. 31).

Lewis and Kramer then took the package to the DEA office at the airport, where the cocaine was removed and found to weigh approximately six and one-half ounces. (S.H. 36, T. 33). A sample of the substance was removed for further testing, and the package was then re-wrapped to appear as if it had never been opened, for the purpose of delivering it. (S.H. 35; T. 37).

Agent Lewis, dressed to look like a delivery man, then made a "controlled delivery" of the package to Mrs. Jacobsen. (T. 40-1). In the meantime, other agents obtained a search warrant to be executed at the Respondents' residence after the delivery of the package. (T. 365). Agent Lewis therefore returned approximately one hour later, claiming he had not received a proper signature for the package. When he was denied entry to the residence, forcible entry was made. (T. 49, 51-3). Execution of the warrant resulted in the discovery of residue from the package (T. 173), the original cardboard box (T. 367), a baggie containing cocaine traces (T. 77) and various paraphernalia. (T. 368-76).

2. Respondents moved to suppress the evidence obtained pursuant to warrant on the grounds that the warrant was based upon a prior, illegal search without a warrant, relying in part on *Walter v. United States*, 447 U.S. 649 (1980). Both the Magistrate (App. E, 24a-25a) and the District Court (App. D, 15a) found *Walter* distinguishable and therefore denied the motion to supress.

3. The Court of Appeals for the Eighth Circuit reversed the decision of the District Court, finding *Walter*

controlling. (App. A, 4a-6a). As in *Walter*, Respondents had a legitimate expectation of privacy in the package; private parties conducted a search of the package; but once the Government obtained lawful possession of the package, they conducted an unlimited official search which exceeded the scope of the private search. The Court of Appeals thus concluded:

> The DEA agents' extension of the private search precisely parallels that in *Walter*. In both cases, viewing the objects with unaided vision produced only an inference of criminal activity. In both cases, government agents went beyond the scope of the private search by using mechanical or chemical means to discover the hidden nature of the objects. The governmental activity represents a significant extension of the private searches because it revealed the content of the films in *Walter* and, here, the composition of the powder. In the absence of exigent circumstances, which the government does not allege, we hold the agents were required to obtain a warrant authorizing the taking of samples and analysis thereof. (App. A. 6a; fn. omitted).

REASONS WHY THE PETITION SHOULD BE DENIED

1. The Government's first argument in support of their Petition is that the removal of several samples of powder from the package and their field testing by the narcotics agents violated no Fourth Amendment rights of the Respondents because the Respondents had no legitimate expectation of privacy in the cocaine. (Pet. at 7). Their argument is based upon a faulty premise, however, as it is established beyond peradventure that Respondents "had a reasonable expectation of privacy that the contents of the package

would remain private." (App. A, 3a). In support of this proposition, the Court of Appeals cited *Ex Parte Jackson*, 96 U.S. 727 (1878), which stated in relevant part:

> Letters and sealed packages of this kind in the mail are as fully guarded from examination and inspection, except as to their outward form and weight, as if they were retained by the parties forwarding them in their own domiciles. The constitutional guaranty of the right of the people to be secure in their papers against unreasonable searches and seizures extends to their papers, thus closed against inspection, wherever they may be. Whilst in the mail, they can only be opened and examined under like warrant, issued upon similar oath or affirmation, particularly describing the thing to be seized, as is required when papers are subjected to search in one's own household. 96 U.S. at 733.

Accord, *United States v. Chadwick*, 433 U.S. 1, 10 (1977); *Walter v. United States, supra*, 447 U.S. at 654 n. 5. As Chief Justice Burger also recognized in *Chadwick*,

> Respondents' principal privacy interest in the footlocker was, of course, not in the container itself, which was exposed to public view, but in its contents. A search of the interior was therefore a far greater intrusion into Fourth Amendment values than the impoundment of the footlocker. Though surely a substantial infringement of respondents' use and possession, the seizure did not diminish respondents' legitimate expectation that the footlocker's contents would remain private. * * * 433 U.S. at 14 n. 8.

See also, *Arkansas v. Sanders*, 442 U.S. 753, 762 (1979); *Robbins v. California*, 453 U.S. 420, 426 (1981).[1]

[1]Respondents do not understand *United States v. Ross*, 456 U.S. —, 102 S.Ct. 2157 (1982) to have affected the viability of the portions of the opinions cited.

This case does not involve, therefore, any question of the Respondents' legitimate expectation of privacy in the package searched. Rather, it involves whether Government agents may extend the scope of a search which has already been conducted by private parties. This is the question answered in the negative by the Court of Appeals (App. A, 5a) and by this Court in *Walter*, 447 U.S. at 656-657.

It is undisputed that in their examination of the package, Federal Express employees only looked at the plastic bags containing the white powder, and did not open them nor remove any of the contents. After their examination, the package was partially re-wrapped (S.H. 56), and the powder contained within the plastic bags, which in turn were contained within the tube of the duct tape, which in turn was covered by newspaper, could not be seen when the package was turned over to the narcotics agents. (S.H. 57).[5] Therefore it is clear that the withdrawal of samples and field-testing of the powder from the plastic bags clearly was more extensive than the search by Federal Express. In light of these facts, the Government's position that *Walter* "does not at all" (Pet. at 8) support the conclusion of the Court of Appeals is unfounded. In *Walter*, a private carrier delivered twelve large, sealed packages containing 871 boxes of film to the wrong company. Employees of that company opened the boxes, discovering that they had suggestive drawings on one side and explicit descriptions of the sexual contents on the other, with one employee attempting, unsuccessfully, to view the films by holding them up to the light. Once the contents of the boxes had been thus examined, the FBI was contacted, and lawfully acquired possession of the boxes of film. However, without making any

[5]The finding of the Court of Appeals that the plastic bags were visible from the end of the duct tape tube is to the contrary. (App. A, 1a).

effort to obtain a warrant, the FBI viewed the films with a projector, some as late as two months after taking possession. The defendants were tried and convicted of obscenity charges after a motion to suppress was denied; this Court reversed, finding that

> the unauthorized exhibition of the films constituted an unreasonable invasion of their owner's constitutionally protected interest in privacy. It was a search; there was no warrant; the owner had not consented; and there were no exigent circumstances. 447 U.S. at 654.

The Court explained that merely because the FBI lawfully obtained possession of the boxes, it did not necessarily follow that they were given authority to search the contents, since "an officer's authority to possess a package is distinct from his authority to examine its contents." Ibid. (Fn. omitted).

Finally, the Court found unpersuasive the fact that the employees of the private business concern had searched the boxes before the Government instituted any search.

> Nor does the fact that the packages and one or more of the boxes had been opened by a private party before they were acquired by the FBI excuse the failure to obtain a search warrant. . . . In this case there was nothing wrongful about the government's acquisition of the packages or its examination of their contents to the extent that they had already been examined by third parties. Since that examination had uncovered the labels, and since the labels established probable cause to believe the films were obscene, the government argues that the limited private search justified an unlimited official search. That argument must fail, whether we view the official search as an

> expansion of the private search or as an independent search supported by its own probable cause. 447 U.S. at 656.

For constitutional purposes, the conduct of the narcotics agents here is indistinguishable from that of the FBI agents in *Walter:* there was a private search of the contents of the package; the agents obtained custody of the package lawfully; but once the agents obtained possession of the package, they executed an unlimited official search, which went beyond the scope of the private search. *Walter* therefore squarely controls this case.[*] Respondents clearly had a legitimate expectation of privacy in the package; the package lawfully came into government possession; but once the agents conducted a search more extensive than that conducted by Federal Express, they violated the Fourth Amendment.

2. The Government next suggests that review should be granted because the Court of Appeals noted the conflict between its decision and that of the Sixth Circuit in *United States v. Barry*, 673 F.2d 912 (6th Cir.), cert. den. 103 S.Ct. 238 (1982). (Pet. at 10; App. A, 6a n.4). In *Barry*, a damaged package was examined by Federal Express employees, who opened and discovered it to contain four large bottles of methaqualone pills. Because of the large number of pills and effacement of the pharmaceutical numbers, the DEA was notified. Agents removed five pills for testing, and then returned the package to Federal Express.

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[*]The government claims that the implication of First Amendment rights "played a role" in the decision in *Walter v. United States*, 447 U.S. 649 (1980). (Pet. at 8). The opinion of the Court observed that the warrant requirement must be "scrupulously observed" where materials arguably protected by the First Amendment are involved. 447 U.S. at 655 & n. 6. It does not appear, however, that the nature of the materials searched without a warrant were critical to the outcome in *Walter*.

The defendant was arrested when he picked the package up.

The Court of Appeals held that the search (removing the pills for testing) could not be justified by the "plain view" exception to the warrant requirement because two essential elements—exigency and inadvertency—were not present. 673 F.2d at 918. However, the Court found that there was no Fourth Amendment violation because Barry had no legitimate expectation of privacy in the contraband at the time of seizure.

> Barry and his supplier . . . could have taken greater precautions to disguise the shipment. They chose not to. Instead, they shipped a large quantity of pills in clear bottle which were plainly labeled Methaqualone. In addition, the prescrpition numbers on the labels had been effaced. In light of Barry's failure to take precautions to protect his privacy interest from the risk of exposure inherent in his bailment, we find that he had no reasonable expectation of privacy in his drug parcel. 673 F.2d at 919.

One's interest in privacy, of course, is in the contents of a package, as clearly established above. In any event, the case is factually distinguishable, as the cocaine here was contained within four plastic bags, enclosed in duct tape, covered by newspaper, contained within a box and not visible to the agents when they seized it.* The same was not true for the methaqualone.

Barry also found *Walter* distinguishable, stating that

> *Walter* turned on the fact that the material seized was protected by the First Amendment. The chemical testing of Barry's pills was simply not an investigation

*See note 2, *supra*.

> on the scale required in *Walter* to adjudge the obscenity of the films. It was at most routine. 673 F.2d at 920.

As we observed above, *supra* n. 3, we disagree with the Sixth Circuit's analysis of *Walter* and submit that any First Amendment considerations existent there were not determinative of this Court's decision. Accord, App. A, 6a-7a n. 4.

We also disagree with the *de minimus* theory apparently suggested by the Court of Appeals' language. We are aware of no doctrine that "minor" or "routine" illegal searches do not result in suppression, but "major" ones do. Once an individual's actual expectation of privacy and the reasonability of that expectation have been established, *Katz v. United States*, 389 U.S. 347, 361 (1967) (Harlan, J., concurring); *Smith v. Maryland*, 442 U.S. 735, 740 (1979), the magnitude of the intrusion is irrelevant.

Thus, although demonstrably wrongly decided, *Barry* is distinguishable and therefore certiorari is not required to reconcile any conflict. Finally, not one of the other cases cited by the Government (Pet. at 10-11) discusses *Walter;* and in all but one[5] the issue involved was a private versus government search, which is expressly not involved here. See, *Burdeau v. McDowell*, 256 U.S. 465, 475 (1921). The cases are therefore totally inapposite to the granting of certiorari here.

3. Finally, the Government asserts that by allowing the decision of the Court of Appeals to stand, law enforcement efforts will be severely hampered (Pet. at 11), warrants will be required for all field tests of suspected nar-

[5] *United States v. Rodriguez*, 596 F.2d 169 (6th Cir. 1979) (plain view).

cotics (ibid.) and warrants will be required for laboratory analyses of lawfully seized samples of suspicious substances. (Pet. at 12). The hyperbolic reasoning underlying these assertions shows that the Government fails to correctly perceive the import of the Court of Appeals' ruling.

The Eighth Circuit held that the scope of the Government's search exceeded the scope of the private search and because there were no exigent circumstances a warrant was required. (App. A, 6a). This ruling clearly follows the holding in *Walter* that the "strict limitation" applicable to the particular description requirement in a search warrant must as well be applied to the scope of a government search which follows a private search. 447 U.S. at 657.

The Court of Appeals did not hold, however, that *every* field test requires advance judicial authorization. The decision in no way suggests nor indicates that a warrant would be required when suspected contraband is in plain view (drugs falling out of a broken package), where there is consent (a traveler relinquishing his package for examination), under exigent circumstances, which were expressly not present here (a consignee arriving to pick up his package) or any other exception to the warrant requirement which may arise.

The Government's logic is carried to its illogical extreme in asserting that search warrants will be required for laboratory testing of *lawfully seized* substances if the Court of Appeals' decision stands. The presence of a substance in a laboratory suggests that it was obtained pursuant to warrant, incident to arrest, from a hand-to-hand buy, or some other form of law enforcement activity. In any event, no matter how custody was obtained, the Government is then free to perform whatever testing it desires. If the substance

has been seized illegally, the results of the testing will be of no avail; if seized lawfully, the Government has already gained lawful possession and control—in effect ownership —and we are aware of no constitutional doctrine in this case or any other which would require a search warrant before testing is performed. To suggest otherwise is pure sophistry.

In the unusual case[4]—such as that here—narcotics officers will be required to get a warrant. However, the period of resultant delay will probably not be "considerable" as the Government suggests (Pet. at 11), as experienced officers can easily obtain a warrant in an hour or less. And, obtaining a warrant will hardly impede an investigation where the officers already possess the package and can easily pursue other required attendant investigation while the warrant is obtained. Finally, the possibility of prejudicing innocent parties is remote at best: those possessing packages with illicit substances can be (and usually are) allowed to leave while a warrant is obtained; packages containing legal substances will presumably be searched with consent.

In any event,

> the mere fact that law enforcement may be made more efficient can never by itself justify disregard of the Fourth Amendment. * * * The investigation of crime would always be simplified if warrants were unnecessary. But the Fourth Amendment reflects the view of those who wrote the Bill of Rights that the privacy of a person's home and property may not be totally sac-

[4]Our research discloses that this case and *United States v. Barry*, 673 F.2d 912 (6th Cir.), cert. den. 103 S.Ct. 238 (1982) are the only federal decisions to discuss *Walter* in this context. The issue is also sub judice in *United States v. Bradley and Diane Pfeifer*, 9th Cir. Nos. 82-1498, 82-1499.

rificed in the name of maximum simplicity in enforcement of the criminal law. *Mincey v. Arizona*, 437 U.S. 385, 393 (1978). (Citations omitted).

CONCLUSION

The Petition for a Writ of Certiorari should be denied.

Respectfully submitted,

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